IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 477 of 1997

with

LETTERS PATENT APPEAL No 616 of 1997

with

LETTERS PATENT APPEAL No 617 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANTILAL DAMODARDAS SHAH C/O RAJKAMAL PROVISIONS STORES
Versus
UNION OF INDIA THROUGH SECRETARY

Appearance:
1. LETTERS PATENT APPEAL No. 477 of 1997
MR SHIRISH SANJANWALA, SENIOR ADVOCATE with
MR RS SANJANWALA for Appellant
MR JAYANT PATEL for Respondent No. 1
RULE SERVED for Respondent No. 2
MS DS PANDIT, AGP for Respondent No. 3

2. LETTERS PATENT APPEAL No. 616 of 1997
MR SHIRISH SANJANWALA, SENIOR ADVOCATE with
MR RS SANJANWALA for Appellant
MR JAYANT PATEL for Respondent No. 1
RULE SERVED for Respondents No. 2 and 4
MS DS PANDIT, AGP for Respondent No. 3

3. LETTERS PATENT APPEAL No. 617 of 1997
MR SHIRISH SANJANWALA, SENIOR ADVOCATE with
MR RS SANJANWALA for Appellant
MR JAYANT PATEL for Respondent No. 1
RULE SERVED for Respondents No. 2 and 4
MS DS PANDIT, AGP for Respondent No. 3

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE M.C.PATEL

Date of decision: 26/04/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

These three appeals which raise common questions have been argued together.

2. Letters Patent Appeal No. 477 of 1997 has been directed against the judgment and order dated 26.12.1996 of the learned Single Judge in Special Civil Application No.3477 of 1996 in which the petitioner had challenged the order of his detention which was made on 19.12.1974 and sought for a declaration that the detention order being void and illegal, no action could be taken against the petitioner and his relatives under the provisions of the Smuggling and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (`SAFEMA' for short). A copy of the order dated 19.12.1974 is at Annexure `B' and a copy of the communication of the grounds of the detention is at Annexure `C' to the petition.

2.1 The petitioner (Kantilal Damodardas Shah) was ordered to be detained pursuant to the detention order dated 19.12.1974 made under Section 5 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (`COFEPOSA' for short). According to the petitioner, the respondent no.2 issued a notice under Section 6 of SAFEMA on 28.04.1979 which was received by him on 03.05.1979 stating that he had reason to believe that properties described in the Schedule to

the notice were illegally acquired by the petitioner and called upon him as to why they should not be forfeited to the Central Government under the Act. A copy of the reasons accorded for issuance of notice was also served on the petitioner. The description of the movable and immovable properties in respect of which the notice was given is contained in paragraph 3 of the petition. It is contended that the detention order made against him on 19.12.1974 was illegal and unconstitutional and since that order was bad in law, it cannot form the basis for proceedings against the petitioner or his relatives under the SAFEMA. The petitioner had challenged the order of his detention on various grounds in Special Civil Application No.2051 of 1979. However, the Constitution 42nd Amendment Act of 1976 made it impossible for the detenu to challenge the orders of detention on any of the grounds permissible under Part III of the Constitution. It is stated that after the powers of the Supreme Court and the High Courts were restored for examining the challenge against laws which contravened the provisions of Part III of the Constitution, it became possible for the petitioner to challenge the said order of his detention on the ground of being violative of Article 22 of the Constitution and the provisions of the COFEPOSA. It is stated that the challenge against the provisions of SAFEMA was now not open for the petitioner and, therefore, the petitioner was required to confine his attack to the detention order on the basis of the provisions contained in COFEPOSA. According to the petitioner, the earlier challenge against the order of his detention dated 19.12.1974 could not be pursued by him and could not be decided on merits by the High Court on account of the powers of the High Court being taken away by the Forty-Second Amendment made during the emergency. It is stated that his wife had filed Special Criminal Application No.51 of 1975 challenging the provisions of Section 3 of COFEPOSA and the detention order of the petitioner. However, that petition remained pending without disposal on merits on account of the situation arising out of declaration of emergency.

2.2 In para 9 of the petition, it has been stated that when the earlier petitions filed by the petitioner and his wife came up for hearing, it was advised that on account of the powers of the High Courts and Supreme Court, to enforce the provisions of Part III of the Constitution, having been taken away, it would be better not to pursue the petitions at that stage till those powers were restored and that after restoration of the powers, it would be better for the petitioner to agitate the said points raised by them in the petitions filed by

the petitioner and his wife and, therefore, "on this understanding arising out of the impossibility of the High Court in deciding the matter on merits, the said petitions were not pursued". It is then stated in para 10 of the petition that during the pendency of the petitions filed by the petitioner and his wife in which the order of detention was challenged, the period mentioned in the detention order came to an end and therefore, the petitioner was set at liberty without the order of the court and without the order of detention being set aside, either by the Government or by the court, on merits. It was stated that this situation resulted in deprivation of the right of the petitioner to challenge the provisions of the SAFEMA because it could not be said that the release of the petitioner from detention was on account of quashing the order of his detention by any court of law. It is then stated that in view of the notice given by the competent authority under the SAFEMA to appear before him on 09.05.1996 to show that the properties in question were procured out of the earnings made from illegal activities, it became necessary for the petitioner to challenge the order of detention dated 19.12.1974, because, unless that order was set aside judicially, the SAFEMA proceedings which were started against the petitioner and his relatives would be continued.

2.3 Originally, an order was made on 23.09.1974 under the provisions of the Maintenance of Internal Security Act by the Commissioner of Police of the city. That order was challenged by the petitioner's wife in Special Criminal Application No.245 of 1974, as stated in para 15 of the petition. However, before the petition could reach for final hearing, the COFEPOSA was enacted and a fresh order of detention was passed under that Act against the petitioner on 19.12.1974. The petitioner's wife, therefore, withdrew the Special Criminal Application No.245 of 1974.

2.4 There were three grounds on which the order of detention was made on 19.12.1974 and these grounds were communicated to the petitioner by communication dated 22.12.1974. As per the first ground, during the search carried out on April 10, 1966, the Deputy Superintendent of the Central Excise seized goods of foreign make - 99 wrist watches, 3 Shavers and 26 other wrist watches, out of which 26 wrist watches were confiscated by the order dated 10.11.1967 of the Deputy Collector of Central Excise, Ahmedabad, a copy of which is at Annexure E to the petition. The petitioner assailed ground no.1 on the ground that it related to an incident which took place

more than 8 years back and therefore had no rational proximity with the detention order.

2.5 The second ground which is referred to in para 24 of the petition related to a search of the petitioner's Rajkamal Provisions Store, which was made on December 10, 1971 during which wrist watches, blades, razors, flints, electric shaver, shaving razors, perfume, lighters, cigarettes, playing cards, fabrics, recording tapes, gas lighters, fountain pens, chocolates and other miscellaneous goods of foreign origin were seized by the Customs officials on a reasonable belief that they were smuggled goods. The Collector, Central Excise decided the case imposing a penalty of Rs.6000/- on M/s. Rajkamal Provisions Stores and Rs.3000/- on the detenu. This ground is challenged on the footing that the detaining authority had not properly applied its mind to all the relevant circumstances of the case and had ignored material facts.

2.6 The third ground which is referred to in para 28 of the petition is in respect of the raid which had taken place on 9th and 10th May, 1972 by the Customs officers on the petitioner's premises during which one film movie projector along with one obscene movie film, one transistor set, two obscene books and one projector bulb of foreign origin valued at Rs.15,372/- were seized. This ground is attacked on the footing that the detaining authority did not apply his own mind to the facts and circumstances of the case.

2.7 It is stated in para 29 of the petition that Special Civil Application No.5528 of 1986 was filed by the petitioner challenging the order of his detention and that was dismissed on 09.08.1994 in view of the judgment of the Supreme Court in Attorney General for India vs. Amratlal Pranjivandas reported in {1994 JT (3) Supreme Court 583}.

3. In the affidavit-in-reply filed on behalf of the respondent no. 2, it was stated that the Special Civil Application No.2051 of 1979 filed by the petitioner was dismissed by the High Court on 09.08.1994. Even the other petition Special Civil Application No.5528 of 1986 was so dismissed on 09.08.1994. Therefore, the present petition, which was filed on the same subject matter, was barred by res judicata and also constructive res judicata. It is stated that in Special Civil Application No.5528 of 1986, the detention order was already challenged while in Special Civil Application No.2051 of 1979, the petitioner could have challenged the same but

did not do so. It is further stated that, as admitted by the petitioner, even in Special Criminal Application No.51 of 1975 which was preferred earlier, the said order of detention was challenged. It is stated that as the petitioner did not produce a copy of the order passed in Special Criminal Application No.51 of 1975, no further comments could be offered. It is also stated that the petitioner had undergone the detention period and had abandoned the cause for challenging the detention order and therefore, it was not open for him to challenge the same again. Moreover, since the order of detention dated 19.12.1974 was neither revoked by the Advisory Board nor was it cancelled or quashed by any court, it could not now be challenged while questioning the proceedings under the SAFEMA. It is contended that if the detenu did not choose to question the detention order before the court during the period when such order was in force or was unsuccessful in his attempt to challenge the same, he or his relatives or associates cannot attack or question its validity when the order is made the basis for applying the SAFEMA to him or his relatives or associates.

4. The learned Single Judge took note of the fact that Special Criminal Application No.51 of 1975 was earlier filed by the detenu's wife challenging his detention and that petition came to be rejected by an order of this court on 04.02.1977. The Court also took note of the fact that Special Civil Application No.2051 of 1979 challenging the SAFEMA notice dated 28.04.1979 received by the petitioner on 03.05.1979 was also rejected on 09.08.1994. Special Civil Application No.5528 of 1986 filed by him raising challenges including against his detention order was also rejected on 09.08.1994 in view of the decision of the Supreme Court in the case of Attorney General for India vs. Amratlal Pranjivandas (supra). The learned Single Judge held that the matter was squarely covered by the ratio of the decision of this court in Manharlal R. Tailor vs. Competent Authority reported in XXXVIII (2) GLR 1151 in which it was held that subsequent petitions containing identical prayers as in the previous petitions were barred by constructive res judicata because for the same cause of action, a party cannot be allowed to litigate the issue time and again. The learned Single Judge therefore upholding the preliminary objection raised by the respondents rejected the petition (Special Civil Application No.3477 of 1996) on the ground that it was barred by the principles of constructive res judicata.

5. The Letters Patent Appeal No.616 of 1997 arises out of Special Civil Application No.8429 of 1996 which

was filed on similar grounds by the detenu's wife Pushpaben challenging the order of detention of her husband Kantilal as unconstitutional, illegal and invalid and for restraining the respondent authorities from taking any steps against her under the SAFEMA. The petition was heard along with the main matter and by order dated 26.12.1996, it was rejected by the learned Single Judge for the same reasons as were given for rejecting the Special Civil Application No.3477 of 1996.

6. Letters Patent Appeal No.617 of 1997 arising from Special Civil Application No.8467 of 1996 filed by Rajnikant, son of the detenu which raised identical issues was also rejected by the learned Single Judge for the same reasons on 26.12.1996.

7. The learned senior counsel appearing for the appellants in these appeals submitted that the question of res judicata has been erroneously decided by the learned Single Judge and that the judgment in Manharlal Ratilal Tailor's case (supra) has no application to the facts of these cases. It was submitted that in the present case though the detention order was earlier challenged in Special Criminal Application No.51 of 1975 and Special Civil Application No.5528 of 1986, the validity of the detention order was never examined on merits in either of these two petitions. It was submitted that though the detention order was challenged, the challenge had never failed on merits. He pointed out that while disposing of Special Criminal Application No.51 of 1975 in which the detention order was challenged by the petitioner's wife as his next friend, the court had, on 24.2.1977, made the order dismissing the petition on the ground that the enforcement of the fundamental rights was suspended leaving it open to the petitioner to make a fresh application after the ban imposed on the enforcement of the rights conferred by Articles 14, 19, 21 and 22 was lifted. He submitted that even Special Civil Application No.5528 of 1986 was dismissed on 09.08.1994 without going into the merits of the challenge against the validity of the said detention order and it was simply ordered that in view of the decision of the Supreme Court in the case of Attorney General for India vs. Amratlal Pranjivandas (supra), the petition was dismissed. Identical order was made for dismissing Special Civil Application No.2051 of 1979 on the same date. It was submitted that thus, the challenge against the detention order never failed on merits and it was due to the operation of the emergency period that no final adjudication could take place in Special Criminal Application No.51 of 1975 in which the detention order

was challenged because during the pendency of the petition, the court could not have examined the question of validity of the order and since the court itself had reserved liberty for the petitioner to file a fresh petition after the ban was lifted, there could arise no question of invoking the doctrine of res judicata or constructive res judicata against any subsequent challenge by the petitioner. It was submitted that so long as the SAFEMA notice was not issued on the detenu and his relatives, they had no reason to challenge the detention order since the detenu had already undergone the period of detention. It was the SAFEMA notice which furnished a fresh cause of action for challenging the detention order. It was also submitted that had the court not dismissed the Special Criminal Application No.51 of 1975 on 04.02.1977, the petitioner could have raised additional grounds for challenging the detention order, such as, that the grounds were non-existent when the detention order was made or that the matter was not reviewed when the detention was continued under Section 12-A of the COFEPOSA. It was further argued that once emergency was revoked on 21.03.1977, it was obligatory on the part of the respondents to furnish the grounds of his continued detention under Section 12-A of the Act. The learned senior counsel submitted that this detenu's case falls within the ratio of the Attorney General's case (supra) which was followed and explained in three subsequent judgements of the Supreme Court in Competent Authority, Ahmedabad vs. Amritlal Chandmal Jain and Others reported in (1998) 5 SCC 615, Gangadevi (Smt.) vs. Union of India and Another reported in (1996) 6 SCC 401 and Karimaben K. Bagad vs. State of Gujarat and Others reported in AIR 1998 SC 2938. It was submitted that the effect of these decisions of the Supreme Court was that if there was a challenge against the order and the court did not go into the question on merits for any reason, the detention order could be examined while questioning the proceedings under the SAFEMA. The learned senior counsel submitted that if the court does not decide the merits of the matter or is precluded due to emergency to go into the question of validity of the detention order, the detenu cannot be blamed in the matter and should be in a position to raise a challenge against the order when the SAFEMA proceedings are initiated giving a fresh cause of action to the detenu and his relatives at a time when the court was free to go into the question of the validity of the detention order.

8.1 The learned senior counsel relied upon the following decisions in support of his contentions:

(a) Ghulam Sarwar, vs. Union of India and Others reported in AIR 1967 SC 1335, a decision of the Constitution Bench, was cited for the proposition that the principle of res judicata is not applicable in a writ of habeas corpus so far as High Courts are concerned. But unlike in England, in India the person detained can file original petition for enforcement of his fundamental right to liberty before a Court other than the High Court namely, the Supreme Court. The order of High Court in such a case will not be res judicata because it is either not a judgement or because the principle of res judicata is not applicable to a fundamentally lawless order.

(b) The decision in Kewal Singh, vs. Mt. Lajwanti reported in AIR 1980 SC 161 was cited for the proposition, reflected in paragraph 8 of the judgement, that it was well settled that one of the essential conditions of res judicata is that there must be a formal adjudication between the parties after full hearing. In other words, the matter must be finally decided between the parties.

(c) The learned senior counsel referred to the decision of the Supreme Court in Lallubhai Jogibhai Patel vs. Union of India and Others reported in AIR 1981 SC 728 in which the Supreme Court in para 13 of its judgement held that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is inapplicable to illegal detention and does not bar a subsequent petition under a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief. In the petition before the Supreme Court, as it was noted, additional grounds were taken to challenge the illegality of the continued detention of the detenu and the Supreme Court therefore held that the subsequent writ petition was not barred by res judicata and overruled the preliminary objection which was raised by the respondents.

(d) The decision in Kirit Kumar Chamanlal Kundaliya vs. Union of India and Others reported in AIR 1981 SC 1621 was cited for the proposition that the doctrine of res judicata was inapplicable to

cases where the two forums have different and independent jurisdictions. It was held that in a subsequent petition under Article 32, points not agitated before the High Court under Article 226 can be agitated.

(e) The decision of the Supreme Court in Indian Oil Corporation Ltd. vs. State of Bihar and Others reported in AIR 1986 SC 1780 was cited to point out that it was held by the Supreme Court that dismissal of a Special Leave Petition in limine by a non-speaking order does not justify any inference that by necessary implication, the contentions raised in the Special Leave Petition on merits of the case have been rejected by the Supreme Court. It was held that neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of the Supreme Court dismissing the Special Leave Petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court.

(f) The decision of the Supreme Court in Pandurang Ramchandra Mandlik (since deceased by his Lrs.) and another vs. Smt. Shantabai Ramchandra Ghatge and Others reported in AIR 1989 SC 2240 was cited to point out that it was held that remanding of a case by the High Court for hearing by Trial Court with a direction to refer issues regarding tenancy to the tenancy authorities was held not to have been barred by the principle of res judicata.

(g) The decision of the Supreme Court in Ramesh Chandra vs. Shiv Charan Dass and Others reported in AIR 1991 SC 264 was referred to for pointing out that it was held that one of the tests to ascertain if a finding operates as res judicata is whether the party aggrieved could challenge it.

(h) Referring to the decision of the Supreme Court in Attorney General for India vs. Amratlal Pranjivandas (supra), the learned senior counsel pointed out from paragraph 41 of the judgment that the Supreme Court had held that a person who did not choose to challenge the detention order during the emergency when he was detained, or challenged it unsuccessfully, cannot be allowed to challenge it when it is sought to be made the

basis for applying SAFEMA to him. He submitted that this clearly meant that either the detenu should not have at all challenged the order of detention or if he had challenged he should have been unsuccessful in the challenge which meant that his challenge should have been negatived on merits and therefore the ratio of this decision did not go against the detenu who had not been unsuccessful in his challenge against the order of detention because its validity was never examined on merits due to emergency provisions.

(i) The decision of the Supreme Court in Gangadevi (Smt.) vs. Union of India and Another reported in (1996) 6 SCC 401 was cited to point out that the widow of the detenu who had died while in detention was entitled to challenge his order of detention because it was being made a foundation for forfeiting her properties under the SAFEMA. In that case, the detenu had filed a petition which was pending in the Bombay High Court for challenging the detention order dated 22.09.1975 and the detenu died on 01.05.1976. On an incorrect statement made before the court that the detenu was released, the court made an order on 12.04.1977 dismissing the petition as infructuous. The Supreme Court held in the background of these facts that the writ petition filed by the detenu was not decided on merits and that it was dismissed on an incorrect representation made by the State and that the order was made against a dead person and therefore, a nullity. The Supreme Court, therefore, directed that the order of the High Court being a nullity, the petition shall be deemed to be continuing leaving it open for the widow of the detenu to continue the petition provided she applied to the High Court for permission to come on record, as stipulated in the direction.

(j) The decision in Karimaben K. Bagad vs. State of Gujarat and Others reported in AIR 1998 SC 2938 was cited for the proposition that where there was no adjudication on merits of the detention order, it was open for the petitioner to question that detention order while assailing proceedings initiated under the SAFEMA. In that case, the husband of the appellant was detained under an order made on 25.02.1977 and during the pendency of the Special Civil Application No.101 of 1977

in this High Court challenging the detention order, the order was revoked by the Government on 04.08.1977, and, on 08.08.1977, the court observing that since the detention was revoked the petition did not survive, disposed it off without going into the merits of the case. After the order of detention was revoked, a notice under Section 6 of the SAFEMA was issued to the husband of the appellant who died during the pendency of those proceedings. Thereafter, proceedings were directed to be held under Section 7 of SAFEMA against the detenu's widow. In the background of these facts, the High Court had declined to go into the merits of the case being of the opinion that since the order of detention was revoked, the writ petition was infructuous and had returned no finding on the merits of the challenge to the order of detention. The Supreme Court held that since the validity of the order of detention had been put in issue through a writ petition and the High Court returned no findings on the merits of the case, the petitioner was entitled to question the order of detention while assailing the proceedings initiated under the SAFEMA against her. It was held that the order of detention was challenged earlier, and that challenge was not unsuccessful on merits and therefore the High Court ought to have gone into the question of validity of the order of detention since the existence of such an order was the sine qua non for initiating proceedings under the SAFEMA.

(k) The decision of the Supreme Court in Competent Authority, Ahmedabad vs. Amritlal Chandmal Jain and Others reported in (1998) 5 SCC 615 was cited to point out that the Supreme Court has held that once the detenu is released during the pendency of his writ of habeas corpus by the detaining authority, it cannot always be said that the writ petition had become infructuous. It was held that if the court refuses or itself does not go into the merit of controversy in a writ of habeas corpus when the detenu is released, the detenu on that account cannot be made to suffer holding that he did not successfully challenge his order of detention. In the case before the Supreme Court, the Court did not go into the question of the validity of the order of detention but disposed of the matter on account of the fact that the detenu had already been released from

his detention. It was, therefore, held that it cannot be said that challenge to the order of detention by the detenu was unsuccessful and that he or his relatives or his associates were, in any way, debarred from challenging the order of detention subsequently when notices under the SAFEMA were issued to them.

(l) The decision of a Division Bench of this court in Niranjan Dahyabhai Chokshi & Another vs. Union of India and Others reported in 33 (2) GLR 891 was cited for the proposition that the existence of unrevoked or unquashed order of detention was a pre-requisite to the forfeiture order under the SAFEMA.

9. The learned counsel appearing for the respondents supported the impugned judgement and order of the learned Single Judge in all the three matters and argued that the court had dismissed Special Civil Application No.5528 of 1986 which contained a challenge against the detention order also and therefore, the grounds which were raised therein against the validity of the detention order are deemed to have been dealt with by the court while dismissing the petition. It was submitted that Special Criminal Application No.788 of 1986 which was filed by the petitioner challenging the detention order dated 19.12.1974 was withdrawn, as stated in para 15 of the memo of the writ petition - Special Civil Application No.5528 of 1986. The first notice under the SAFEMA was issued on 28.04.1979. He pointed out that in Special Civil Application No.2051 of 1979 which was filed by the petitioner in which he consciously did not challenge the detention order, though in the body of the petition averments were made against the legality of the order. It was submitted that therefore, the relief which ought to have been prayed for was not prayed in Special Civil Application No.2051 of 1979. In the memo of Special Civil Application No.5528 of 1986, it was stated that an application for amendment to Special Civil Application No.2051 of 1979 was made but it was withdrawn and Special Civil Application No.5528 of 1986 was filed challenging the detention order. He submitted that the position that emerged was, therefore, that the detention order was not challenged in Special Civil Application No.2051 of 1979 though it could have been challenged there and it was challenged in Special Civil Application No.5528 of 1986. Both these petitions came to be dismissed by a Division Bench of this court on the ground that the matter was covered by the decision of the Supreme Court in Attorney General's case (supra). It was submitted that it should

be deemed that on dismissal of Special Civil Application No.5528 of 1986, the challenge against the detention order was negatived and so far as Special Civil Application No.2051 of 1979 is concerned, the matter would be barred by constructive res judicata as the challenge could have been made therein but it was not made. The learned counsel also submitted that "in such cases withdrawal of a petition and dismissal thereof stand more or less on the same footing and, in fact, dismissal was on a much stronger footing". If the petitioner had any grievance against the order of the Division Bench dismissing Special Civil Application No.5528 of 1986 by referring to the judgement of the Supreme Court in Attorney General's case on the ground that the petition was being dismissed without giving a finding on merits - as regards the validity of the detention order, it was open for the petitioner to have challenged that order before the Supreme Court, which was never done. Therefore, the questions which were raised in Special Civil Application No.5528 of 1986 stood concluded.

9.1 The learned counsel cited the following decisions in support of his contentions.

(i) The decision of the Supreme Court in Attorney General for India and Others vs. Amratlal Pranjivandas and Others reported in (1994) 5 SCC 54 was cited for the following propositions that have been laid down by the Supreme Court in context of the proceedings under the COFEPOSA and the SAFEMA in respect of the detention which took place during emergency.

[a] While clause 1 of Article 359 of the Constitution empowers the President to suspend the enforcement of the fundamental rights named in such notification (and any and all proceedings in that behalf in any court), it does not empower the President to suspend the fundamental rights. Those fundamental rights (whose enforcement is suspended) continue in theory to be alive. In view of the fact that the fundamental rights in Part III of the Constitution are allowed to be affected by a Presidential Order, the Court should not read anything more than what the clause expressly says and its language leaves no room for any doubt.

[b] Both the COFEPOSA and the SAFEMA have been protected under Article 31-B read with the Ninth

Schedule to the Constitution. The applicability of the SAFEMA on the basis of the order of detention passed during emergency to which Section 12-A of the COFEPOSA applied was not open to question.

[c] The validity of an order of detention to which Section 12-A of the COFEPOSA applied, could yet be examined even during the emergency on the touchstone of the law as it obtained during the operation of the Presidential Order under Article 359(1) say on the ground that the provisions of Section 12-A were not complied with, or on other grounds, as may not have been barred during the said period. But a person who could have so challenged the order of detention and yet chose not to do so, cannot be allowed to do so when such an order of detention is made the basis for applying the SAFEMA to him. This is for the reason that even if he is allowed to challenge the said order when he is served with the notice under Section 6 of the SAFEMA, the challenge has to be examined with reference to the position of law as was obtaining at the time the said order was made and the law in force during the period the said order of detention was in operation. The same would be the position in the case of a person who challenged the order but failed in his challenge. Even in the case of a normal order of detention under the COFEPOSA, the position would be the same. A person who did not challenge (either by himself or through his next friend) the order of detention or challenged it but failed cannot be allowed to challenge the order of detention when action is taken against him under the SAFEMA (Union of India vs. Haji Mastan Mirza {[1984] 2 SCC 427} and Union of India vs. Manoharlal Narang {[1987] 2 SCC 241} were disapproved). An order of detention to which Section 12-A of COFEPOSA is applicable as well as an order of detention to which Section 12-A was not applicable can serve as the foundation for applying the SAFEMA to such detenu and to his relatives and associates, provided such order of detention does not attract any of the sub-clauses in the proviso to Section 2(2)(b) of the SAFEMA. If such detenu did not choose to question the said detention before the court during the period when such order was in force, or is unsuccessful in his attack thereon, he or his relatives and associates cannot attack or question its validity

when it is made the basis for applying SAFEMA to him or to his relatives or associates.

[d] Section 5-A of the COFEPOSA is not invalid or void. It is not violative of Clause (5) of Article 22.

(ii) The decision of the Supreme Court in Sharadchandra Ganesh Muley vs. State of Maharashtra and Others reported in JT 1995 (7) SC 317 was cited to point out that where the controversy was not raised earlier, the appellant was precluded to raise the same once over and the doctrine of constructive res judicata put an embargo on his right to raise the plea of bar of limitation under Section 11-A of the Land Acquisition Act.

(iii) The Full Bench decision of this court in Bhanubhai Nagjibhai Patel vs. State of Gujarat & Others reported in 37 (2) GLR 803 was cited for the proposition that the second petition challenging the order of detention on the same grounds or on fresh grounds is not maintainable if an earlier petition is withdrawn unconditionally without reserving liberty to the petitioner to initiate a second petition.

10. The President of India proclaimed an emergency under Article 352(1) of the Constitution of India on 25.06.1975 on the ground that "the security of India is threatened by internal disturbances". The earlier proclamation dated 03.12.1971 issued under Article 352(1) on the ground that "the security of India is threatened by external arrogance" was already in force. On 27.06.1975, the President of India made an Order under Article 359(1) of the Constitution declaring:

"That the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remain suspended for the period during which the proclamation of emergency made under clause (1) of Article 352 of the Constitution on 03.12.1971 and on 25.06.1975 are both in force."

10.1 The COFEPOSA was amended with effect from 01.07.1975 and Section 12-A was inserted making special

provisions for dealing with emergency. Under Section 12-A, the requirement of supply of grounds was practically dispensed with. In the present case, the detenu Kantilal was detained under the provisions of MISA and on the coming into force of the COFEPOSA, he was detained by the impugned order made on 19.12.1974. That detention continued until the emergency was revoked on 21.03.1977 after which the detenus were released. The order of detention was not revoked or set aside, as contemplated by clause 3 of sub-section 2 of Section 2 of the SAFEMA.

11. The detenu's case is that in view of the Proclamation of emergency and the issuance of Presidential Order under Article 359(1), the court could not have entertained the challenge against the order of detention during the period when the Presidential Order was operative and that is why the court had on 04.02.1977 made an order in Special Criminal Application No. 51 of 1975 reserving liberty to the petitioner to challenge the order after the ban against the enforcement of the fundamental rights was lifted, and dismissed the petition. On this basis it is contended that there was no adjudication on the validity of the detention order and it was open for the detenu or his relatives, against whom proceedings were started under the SAFEMA, to challenge the detention order once again on merits at the time when the SAFEMA proceedings were initiated.

12. On declaration of emergency by the issuance of the Proclamation under Article 352(1), the restrictions imposed by Article 19 of the Constitution on the power of the State to make law or take any executive action get suspended during emergency in view of the provisions of Article 358 of the Constitution and the State can thereupon enact law or take executive action which it was, but for Article 19, competent to do.

12.1 During the period of emergency, the President may make Order under Article 359(1), suspending: (a) right to move any court for enforcement of the fundamental rights specified in the Order and (b) all pending proceedings for the enforcement of such rights during the period when the Proclamation remains in force or a shorter period as may be specified therein. The exception in respect of Articles 20 and 21(b) was introduced by the Constitution 44th Amendment with effect from 20.06.1979. Prior to that the declaration in the Presidential Order could be for all the fundamental rights conferred by Part III of the Constitution.

12.2 During the currency of such Presidential Order mentioning any rights of Part III, the restriction on the powers of the State `to make any law or to take any executive action' which but for the provisions of Part III it would be competent to take, gets removed.

12.3 The law so made will cease to have effect to the extent of incompetency when the Presidential Order ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect. Therefore, the validity of the action taken, before the law ceases to have effect, will have to be decided on the basis of such law as if it had not ceased to have effect. This is because of the exception as respects things done or omitted to be done before the law so ceases to have effect, provided in Clause (1-A) of Article 359.

12.4 After the inclusion of Article 359(1-B) with effect from 20.06.1979, in order to enable the State to make any law or take any action that may be inconsistent with the rights conferred by Part III (except Articles 20 and 21) the requirements of Article 359(1-B) must be satisfied. Article 359(1-B) clearly made a condition precedent to the applicability of Article 359(1-A) by requiring that there should be a recital to the effect that such law is in relation to the proclamation of emergency in operation when it is made and by restricting the protection only to such executive action as is taken under a law containing such a recital. Therefore, after 20.06.1979 even when the proclamation is operative and Presidential Order is made, the State will have no power to take any executive action inconsistent with the fundamental rights if such action has no nexus with the law containing such recital.

13. The detention order dated 19.12.1974 was issued before the declaration of emergency. However, due to the operation of Section 12-A which was inserted with effect from 01.07.1975, the detention of this detenu was continued till the Proclamation of emergency ended on 21.03.1977 and it is said that he was released on 23.03.1977. However, on the Presidential Order being made under Article 359(1) when the Proclamation of emergency was in operation, the right to move the court for enforcement of the rights mentioned in that Order and the proceedings in respect of the rights so mentioned were to remain suspended for the period indicated in the Presidential Order. According to the appellant detenu, this is why his continued detention under Section 12-A could not be challenged on the ground of violation of fundamental rights in respect of which the Presidential

Order was issued till it was revoked.

13.1 The validity of a detention order made under Section 12-A of COFEPOSA could not have been challenged on the ground of inconsistency with the fundamental rights and such proceedings that may be pending against the order would remain suspended by virtue of the Presidential Order made under Article 359(1). When the Proclamation of emergency ceased, the Presidential Order also lost life and the laws made under Article 359(1-A), including Section 12-A of the COFEPOSA, ceased to have effect to the extent of inconsistency with the fundamental rights. However, they would not cease to have effect as respects things done or omitted to be done before the law so ceased to have effect. This means the validity of any executive action taken under Section 12-A of the COFEPOSA, though that provision of law may have ceased to have effect to the extent of inconsistency, could be decided on the basis of that provision as if it did not cease to have effect with respect to such action and not dehors that provision, as was suggested on behalf of the appellant.

14. In Special Civil Application No.2051 of 1979, the detenu had not challenged the detention order dated 19.12.1974 and, in fact, in para 2 of the memo of the petition, it was stated by him that the detention will be separately challenged by the petitioner. In that petition, the Constitution (40th Amendment) Act, 1976, the SAFEMA and the COFEPOSA were challenged while challenging the notice dated 28.04.1979 issued under Section 6 of the SAFEMA and received by the detenu on 03.05.1979. The COFEPOSA was placed in the Ninth Schedule at Entry No.104 by the Constitution (39th Amendment) Act, 1975 and its amendments, by Central Act 13 of 1976 at Sl. No.129 and the SAFEMA at Sl. No.127 of the Ninth Schedule, both by the Constitution (40th Amendment) Act, 1976. Therefore, neither these Acts nor any of their provisions could have been challenged on the ground that such Act or provision was inconsistent with or abridged any of the fundamental rights conferred by the provisions of Part III of the Constitution.

15. When the COFEPOSA and the SAFEMA were placed in the Ninth Schedule read with Article 31-B of the Constitution, they could not have been challenged under Article 13 on the ground that their provisions were inconsistent with any of the fundamental rights. This situation is different from the situation arising on issuance of the Proclamation of Emergency and the Presidential Order under Articles 352(1) and 359(1) of

the Constitution. The effect of Proclamation of Emergency under Article 352 is, as per Article 358, to take away the embargo imposed on the State by Article 13 in respect of the right to freedoms guaranteed by Article 19(1) of the Constitution and to enable the State to make any law that may be inconsistent with the freedoms guaranteed therein. This provision does not ipso facto take away these fundamental rights but merely empowers the State (as defined in Part III) to make any law or take any executive action which, but for the Proclamation, it could not have taken [There is, however, after the 44th Amendment a limitation imposed even on such exercise of emergency power, under Article 358(2) inserted with effect from 20.06.1979, which requires a recital, in such inconsistent law, to be made to the effect that such law is in relation to the existing Proclamation. No executive action taken otherwise than under such law containing the recital is protected from any challenge on the ground that it violates the provisions of Article 19(1), in view of clause (b) of Article 358(2) of the Constitution].

16. The contention that the challenge against the detention order of 19.12.1974 which was continued during emergency under Section 12-A of the COFEPOSA, could not at all have been examined by the court in the petitions earlier filed by the detenu or on his behalf, is wholly misconceived. The provisions of Article 359 enable the President of India to make Order and declare that right to move any court for the enforcement of the fundamental rights which are mentioned in the Order and all proceedings pending in any court for enforcement of rights so mentioned shall remain suspended for the period during which Proclamation is in force. This provision will also show that no fundamental right is ipso facto suspended during the period of emergency but only the right to move the courts in respect of the fundamental rights specially mentioned in the Presidential Order is suspended and so are the pending court proceedings in respect of the rights so mentioned.

16.1 While the Presidential Order made under Article 359(1) operates, the disabling embargo put on the State by Article 13 of the Constitution gets temporarily lifted in respect of the rights mentioned in the Presidential Order and the State is empowered to make any law or take any executive action inconsistent with the provisions of Part III of the Constitution conferring such rights [After the insertion of Article 359(1-B) with effect from 20.06.1979, the restriction on the State power imposed by Article 13 would be lifted only when the law made under

Article 359(1-A) contains a recital that it is in relation to the existing proclamation. The executive action would be protected only to the extent that it is in consonance with such law].

17. Thus:

(A) Even during emergency the fundamental rights are not suspended but only the remedies are suspended;

(B) Even the remedies for the enforcement of fundamental rights which are not mentioned in the Presidential Order are not suspended and such rights can be enforced in the court, even during emergency.

(C) No law can be made under Article 359(1-A) which may be inconsistent with any of the fundamental rights which are not mentioned in the Presidential Order issued under Article 359(1). Any law inconsistent with any fundamental right not specified in the Presidential Order can be challenged in the court even during emergency for enforcement of such fundamental right which is not mentioned in the Presidential Order and the pending proceedings made in respect of such fundamental rights as are not mentioned in the Presidential Order do not get suspended under Article 359(1) during emergency period.

(D) After the insertion of Article 359(1-B) with effect from 20.06.1979, even the law not containing the requisite recital showing that it has nexus with the Proclamation of Emergency which is in operation, can be challenged on the ground that Article 359(1-A) lifting the restriction will not operate in absence of such recital.

(E) The proceedings in courts challenging any law [other than the law made by Parliament whose legislative competence is enlarged in emergency by Article 353(b)], on the ground of want of legislative competence are not affected by Articles 358 and 359 of the Constitution even during emergency and the validity of any such law can be challenged on the ground of want of legislative competence.

(F) The executive power of the Union extends to all

the matters with respect to which the Parliament has power to make laws [See Articles 73(1) and 353(b)]. During the emergency, the executive power of the Centre gets extended under Article 353. The executive power of the State extends to matters with respect to which it has power to make laws, as provided in Article 162. The executive action can be challenged even during the period when proclamation of emergency is in operation on the ground of want of jurisdiction or any ground which does not amount to seeking mere enforcement of the fundamental rights mentioned in the Presidential Order while it is operative, or for being contrary to the legislative provisions or being ultra vires the law conferring the power.

(G) After the insertion of clause (1-B) in Article 359, no executive action which is not taken under any law containing recital as contemplated in Article 359(1-B)(a) is immune from challenge on the ground that it is not authorised by Article 359(1-A) read with Article 359(1-B).

(H) Article 13 in normal times takes away the legislative powers of the State (as defined in Article 12 which includes Parliament and the Legislatures of each of the States) to make any law which is inconsistent with the fundamental rights. The fundamental rights are not suspended during emergency but the remedies are suspended under Article 359(1), as noted above. Suspension of remedies alone would not have enabled the State to make law in breach of Article 13 of the Constitution. This is why the provision removing such restriction to make law in respect of the rights mentioned in the Presidential Order was required to be made under Article 359(1-A) of the Constitution. Otherwise, the challenge on the ground of the law being void under Article 13 could have been entertained even during emergency, because, the fundamental rights are not suspended and the State has no power to make any law inconsistent with the fundamental rights which, if made, would have been void but for that restriction being removed temporarily by Article 359(1-A) of the Constitution in respect of the inconsistent law. Therefore, even during emergency, the challenge against the validity of the law, which has a bearing on the aspect of want of legislative competence under Article 13

> which prevents any inconsistent law from being made, rather than on the enforcement of the fundamental rights, can be entertained by the courts. If the inconsistent law falls within the ambit of Article 359(1-A), then alone it will be immune, otherwise it may be declared void to the extent of the inconsistency which is not protected by Article 359(1-A). All that Article 359(1-A) [read with (1-B) after its insertion] does is to relax the rigour of Article 13 which prohibits the State from making any law which takes away or abridges the rights conferred by Part III of the Constitution.

18. Thus, it would not be correct to say that the validity of a detention order could not have been examined during emergency period by the court on the ground that it was not warranted by the provisions of the COFEPOSA or was contrary to its provisions. The detention order could be tested on the anvil of the provisions of the Act itself though the challenge to the Act on the ground of violation of fundamental rights could not be entertained in view of its placement in the Ninth Schedule and the provisions of the law contained in Section 12-A which was relatable to emergency Proclamation had an additional immunity by virtue of Article 359(1-A) for the temporary period; but, an order made under Section 12-A could also have been challenged on the anvil of Section 12-A itself. There could be no wider curtailment of the rights beyond what was intended by the emergency provisions of Articles 358 and 359 of the Constitution. To illustrate, if an order is made by an authority other than the authority empowered to make it under the Act, the court surely can examine that aspect even during the period of Proclamation of Emergency and strike down the order made by an unauthorised person as contrary to the provisions of the Act.

19. The assertion of the detenu that his challenge against the detention order could not have been examined by the court due to the operation of the Presidential Order that had suspended the right to move the court for the enforcement of the fundamental rights and also suspended the pending proceedings for such enforcement and that the challenge against the detention order was therefore, not entertained and Special Criminal Application No.51 of 1975 in which the detenu had, through his wife as his next friend, challenged the detention order was dismissed on 04.02.1977 reserving liberty to the detenu to challenge the order of his

detention after the ban imposed on enforcement of the rights was lifted, is misleading and incorrect. As discussed hereinabove, the validity of the detention order could yet be examined even during emergency on the touchstone of the law as it applied while the Presidential Order under Article 359(1) operated on the ground that the provisions of the COFEPOSA were not complied with while making the order or that the grounds of detention were non-existent. The detention continued by virtue of Section 12-A could also have been challenged on the ground that the provisions of Section 12-A were not complied with or on other grounds as may not have been barred during the said period.

19.1 The detenu through his wife had filed Special Criminal Application No.51 of 1975 on 15.02.1975 (a copy of which was, at our instance, placed on record during his arguments by the learned senior counsel appearing for the detenu) seeking in paragraph 27:

(a) a declaration that Section 3 of the COFEPOSA and all other sections of the said Act sympathetic with Section 3 were unconstitutional and void

(b) declaring the Presidential Order dated December 23, 1974 as ultra vires and void

(c) directing the respondents to treat the order of detention (dated 19.12.1974 at Annexure A to that petition) as unlawful and void, and

(d) directing the respondents to treat the detention of the detenu Kantilal Damodardas Shah as unlawful and to set him at liberty forthwith.

19.2 The three grounds on the basis of which the detention order was made were dealt with in paragraphs 14 to 19 of the petition challenging the detention order as suffering from the vice of non-application of mind. The provisions of the COFEPOSA were challenged on the ground of want of legislative competence contending that the subject matter of the Act was not covered either by Entry 9 of the Union List or by Entry 3 of the Concurrent List. It appears that after the insertion of Section 5-A in the COFEPOSA, a challenge was also raised that the said provision was not retroactive and that the detention order would be bad even if it was shown that the consideration of any one of the grounds was not

justified. The detenu also challenged the detention on the ground of contravention of Articles 21 and 22 of the Constitution, and, the Presidential Order under Article 359(1) was challenged on the ground that it was beyond the scope of Article 359(1) and violative of Article 14. Thus, the petition contained challenges against the order on the grounds other than for enforcement of fundamental rights which could have been considered by the court (and were, in fact, considered as will be presently shown), as well as grounds for enforcement of fundamental rights which could not have been entertained due to the Presidential Order. In the present petition or during the proceedings, till this court, on its own, called for the record of Special Criminal Application No.51 of 1975 from the High Court Registry, two important judgements rendered therein and which have a direct bearing on the question whether any of the grounds which could have been examined by the court were, in fact, examined have been studiously suppressed. We made available to the appellants's learned senior counsel to his utter embarassment (for, we believed him when he stated that he did not know about those judgments as he did not conduct that earlier petition), xerox copy of the `oral judgment' dated 21/22.10.1975 of a Division Bench [Coram: J.B. Mehta and P.D. Desai, JJ.] which dealt with the two petitions including the appellant detenu's Special Criminal Application No.51 of 1975 recording findings on the challenge against the three grounds on which the detention order was based and formulating and referring to the Full Bench the vital question whether Section 5-A of the COFEPOSA was retroactive so as to apply to the orders of detention passed on or before July 1, 1975 as in case of the appellant and also a xerox copy of the `C.A.V. Judgement' in the two matters including Special Criminal Application No.51 of 1975, rendered on December 15, 1977 by the Full Bench [Coram: B.J. Diwan, CJ, J.C. Mehta and B.K. Mehta, JJ.] which, after an erudite exposition running into 47 pages, held that Section 5-A of the COFEPOSA was retroactive so as to apply to the orders of detention passed prior to July 1, 1975 so long as the order of detention is in force and the person continues to be detained in pursuance of that order and that Section 5-A did not impinge upon the power of judicial review, nor does it impair the jurisdiction of the High Court under Article 226 of the Constitution. After deciding the questions referred, the Full Bench sent the matters back to the Division Bench. If we had not retrieved the portion of the record of Special Criminal Application No.51 of 1975 which was required to be preserved under the High Court Rules, we would perhaps not have been able to know about these two important

judgements rendered in Special Criminal Application No.51 of 1975 which have a direct bearing on the present appeals.

19.3. The Division Bench in its judgement dated 21st/22nd October, 1975 considered in detail the three grounds of the detention order dated 19.12.1974 challenged in Special Criminal Application No.51 of 1975. The grounds for the said order which were communicated in the information letter dated 22.12.1974 and which were reproduced in the said judgement were as follows:

"(1) That on 10-4-1966 when the premises of M/s Rajkamal Provisions Stores at Bhadra, Ahmedabad belonging to you were searched by the Dy. Superintendent, Central Excise (Gold Cell), Ahmedabad, 99 wrist watches of foreign origin were found in a drawer of the counter, and three shavers and 26 wrist watches of foreign origin were found lying in the show case. The above goods were seized by the said Dy. Superintendent of Central Excise (Gold Cell) under the Customs Act, 1962. Value of the above goods amounted to Rs.17,485/-. Out of the above seized goods, 25 wrist watches of foreign origin were confiscated outright vide adjudication order No.8/67 dated 10-11-1967, passed by the Dy. Collector, Central Excise, Ahmedabad.

(2) that on 10-12-1971 the Customs Officers of Ahmedabad Central Excise Collectorate searched the premises of M/s. Rajkamal Provisions Stores, Bhadra, Ahmedabad, belonging to you and goods viz. wrist watches, blades, lighters, flints, electric shaver, shaving razors, perfume, lighters, cigarettes, playing cards, fabrics, recording tapes, gas lighters, fountain pens, chocolates and other miscellaneous goods valued at Rs.15,372/- all of foreign origin were seized by the said officers of Customs, in the reasonable belief that the same were smuggled goods. Show cause notices were issued to you in this case, and the aforesaid case was decided by the Collector of Central Excise, Ahmedabad, in part on 5-9-1973, wherein a penalty of Rs.6,000/- was imposed on M/s. Rajkamal Provisions Stores and a penalty of Rs.3,000/- was imposed on you. You are also being prosecuted in this case for which a criminal complaint was filed on 29-6-1974 and the case is still pending trial in the Court of the Metropolitan Magistrate, 3rd Court,

Ahmedabad.

(3) That premises of M/s. Prince Medical and Provisions Stores, Ahmedabad, owned by you were raided on 9/10-5-1972 by the Customs Officers and as the result of the search fabrics, one film movie projector along with obscene movie film, one transistor set, two obscene books and one projector bulb all of foreign origin valued at Rs.4,197/- were seized by the above officers of the Customs in the reasonable belief that the above goods were smuggled goods. Along with these goods rough accounts of dealing in smuggled watches and cigarettes valued at Rs.6,558/- and Rs.6,730/- respectively, and currency of Rs.4,288/- believed to be the sale proceeds of smuggled goods having been recovered were also seized. In this connection a show cause notice No.VIII/10-33/CUS/72 dated 1-2-73 was issued to you and the case is pending adjudication."

19.4 Regarding ground no.1, for reasons given in detail, the Division Bench held that this ground relating to the search of April, 1966 and adjudication made on 10.11.1967 confiscating the goods of foreign origin worth Rs.17,485/- was a stale ground and would not provide a live-link for the order.

19.5 As far as ground no.2 was concerned, the Division Bench held as under:

"As far as ground No. 2 was concerned, Mr. Daru has rightly made no grievance in that connection as that was clearly a proximate and rational ground providing factual basis for this order. The MISA Amendment Ordinance had come into force in September 1974 and immediately the present detenu was detained thereunder and when the COFEPOSA Act came into force, he was immediately released and detained under this fresh impugned order. Therefore, the validity of that ground could not be disputed." (emphasis added)

19.6 As regards the challenge on the ground of casualness and mechanical approach against ground no. 3, the Division Bench considered the averments in para 19 of the petition and the affidavit-in-reply but observed:-

"It is not necessary to go into this contention because we have already found remaining ground no. 2 to be a valid ground." (emphasis added)

The Division Bench however observed that the question could be resolved after considering the effect of Section 5-A of the COFEPOSA. While referring the two questions, the Division Bench made it clear that it had not expressed any opinion as to the challenge on two wider constitutional questions as they would arise only if this narrower challenge is first answered. The wider questions raised in the petition were as to -

"(1) whether the two Presidential notifications of emergency were malafide as alleged, and whether this court's jurisdiction was not excluded because of the constituent power exercised in that connection; and

(2) whether Article 31-B including the COFEPOSA in the Ninth Schedule by specific entry could not be protective device to preclude the challenge on the score of fundamental rights under the various Articles 14, 19, 21 and 22, because the constituent power ever could not be exercised to alter the fundamental basic structure of the Constitution.

19.7 It was observed by the Division Bench that these two questions could only arise "if Section 5-A which has now been introduced by an Amendment is held to be retroactive so as to apply even to the orders of detention which had been passed on or before July 1, 1975, and further Section 5-A is held to be intra vires on the two narrower grounds raised by Mr. Daru as to whether it impinges upon the power of the judicial review and impairs the jurisdiction of the High Court under Article 226, or because it encroaches upon the judicial power and arrogates to the legislature, judicial function contrary to the scheme of our Constitution."

The Division Bench further observed that "if Section 5-A could apply to such orders, the question of severance would arise because as we shall presently indicate, we are finding that the remaining ground in both these petitions could still remain a valid ground and, therefore, we have to decide the aforesaid two questions and to that extent these two narrow questions indicated by us would clearly arise in these petitions." (emphasis added)

19.8 The Division Bench thus considered the validity of the grounds of detention and held that the ground no. 2 was a valid ground on which the order dated 19.12.1974

can be sustained if Section 5-A of the COFEPOSA was held to have a retroactive effect. After giving this finding on ground no. 2 as a valid ground, the Division Bench referred the following narrow questions to the Full Bench without going into the wider constitutional issues of the Presidential notifications of emergency and challenge on the ground of infringement of Articles 14, 19, 21 and 22 of the Constitution.

"(1) Whether section 5-A is retroactive so as to apply to orders of detention passed or or before July 1, 1975;

(2) If so, whether it is ultra vires, either because

(a) it impinges upon the power of judicial review and impairs the jurisdiction of the High Court under Article 226 of the Constitution; or

(b) it encroaches upon or interferes with the judicial power and arrogates to the legislature the judicial functions contrary to the scheme of our Constitution.

19.9 The Full Bench construing the provisions of Section 5-A held as under in its C.A.V. Judgement, December 15, 1975:-

"The effect of the enactment of Section 5-A is that unless all the grounds for the order of detention are found to be bad, the order cannot be struck down as an invalid order. Therefore, the entire basis that the three fictions provided for conclusive proof is not warranted on the language of the Section itself even it it were to be held that the three different conclusive presumptions are provided for in Section 5-A, in our opinion, the language used in Section 5-A clearly indicates that by necessary implication and by the very words of the Section, retroactive effect was intended to be given and must be given to Section 5-A.

The relevant words which lead to this conclusion are "where a person has been detained in pursuance of an order of detention under sub-section (1) of Section 3 which has been made on two or more grounds". The words which we have

underlined in the phrases set out hereinabove clearly indicate, in our opinion, that by the use of the present perfect tense, the Legislature has intended that the three fictions set out in Section 5-A must operate in cases of all persons who have been detained in the past before the insertion of Section 5-A in the Act and in respect of whom the orders of detention have been made prior to July 1, 1975 when Section 5-A was inserted."

It was further held in context of the power of judicial review in connection with the orders of detention passed under the COFEPOSA that Section 5-A did not curtail the powers of the High Court under Article 226. The Full Bench held:-

"Under these circumstances, merely because some aspect of the judicial review at the hands of the High Courts and the Supreme Court has been taken away in connection with orders of detention passed under the COFEPOSA Act, it cannot be said that the impugned legislation, particularly, Clause (b) of Section 5-A curtails the powers of the High Courts under Article 226 or the Supreme Court under Article 32 and to that extent is ultra vires. In our opinion, as a result of the process of interpretation, it can be found that Clause (b) of Section 5-A can be so applied as to keep it out of the mischief of encroachment upon the powers of the High Courts and the Supreme Court. As we have explained, the only meaning which can be assigned to Clause (b) of Section 5-A is to provide the deeming fiction that if one or more out of several grounds for the order of detention is or are found to be valid, the order of detention shall be deemed to have been passed on the remaining good ground or grounds. That is the only purpose. All other challenges on the ground of judicial review indicated by Bhagwati, J. in Khudiramdas's case (supra) are still open and they have not been in any way curtailed by Clause (b) of Section 5-A. Under these circumstances it must be held that Clause (b) of Section 5-A is not ultra vires the powers of the Central Legislature."

The Full Bench answered the two questions referred to it as follows:-

"Section 5-A of the COFEPOSA is retro-active so

> as to apply to orders of detention passed before July 1, 1975 so long as the order of detention is in force and the person continues to be detained in pursuance of that order. Secondly, Section 5-A does not impinge upon the power of judicial review nor does it impair the jurisdiction of the High Court under Article 226 of the Constitution. it cannot be said that Section 5-A encroaches upon or interferes with the judicial power or arrogates to the Legislature the judicial functions contrary to the scheme of the Constitution. The two matters referred to us will now go back to the Division Bench for disposal according to law."

20. It is clear from the above judgements of the Division Bench and the Full Bench that the validity of the impugned order of detention stood concluded and there was a definite finding reached that the ground no. 2 of the detention order was a valid ground and that by virtue of the retroactive nature of Section 5-A of the COFEPOSA the detention order could be upheld even on this remaining valid ground. These questions stood finally concluded and the challenge against the detention order on the narrow grounds permissible to be considered during the operation of the Presidential Notifications of emergency had failed. The wider issues regarding the constitutional validity of the Presidential Order and the COFEPOSA were not gone into by the Division Bench. After the Full Bench sent the matter back to the Division Bench, the only aspects that remain to be considered in the petition were the aforesaid two wider questions. The order of the Division Bench dated 04.02.1977 dismissing the petition which the appellants have tried to truncate from its above background has to be read in light of the fact that the Division Bench and the Full Bench had already decided the narrower questions regarding the validity of the detention order dated 19.12.1974 and found it to be unassailable by holding that it could be sustained under Section 5-A on one of the grounds i.e. ground no. 2, which was valid. This question could never have been gone into once again by the Division Bench after the Full Bench answered the question referred to it and sent the matter back, because it stood concluded by the judgements of the Division Bench and the Full Bench. Only the wider questions regarding enforcement of fundamental rights remained to be considered and it is for this reason that the Division Bench [Coram: S.Obul Reddi C.J. and M.C. Trivedi, J.] made the following order on 04.02.1977:-

"We are dismissing this application as the enforcement of the fundamental rights conferred by and under Articles 14, 19, 21 and 22 of the Constitution have been suspended. It would, however, be open to the petitioner to make fresh application after the ban imposed on the enforcement of the abovesaid rights is lifted. Subject to the above observations this application is dismissed. Rule discharged."

21. Therefore, only the constitutional issues of validity of the inclusion of the COFEPOSA in the Ninth Schedule and the challenge on the ground that it altered the basic structure of the Constitution and could not be a protective device to preclude the challenge on the score of infringement of the fundamental rights under Articles 14, 19, 21 and 22 which the earlier Division Bench had left open as the wider issues, remained pending and liberty, to make a fresh application after the ban imposed on the enforcement of these rights was lifted, was confined to those wider issues only and had no relevance to the questions which were already concluded by the Division Bench and the Full Bench. In respect of those finally decided questions, the petition stood finally dismissed and the challenge against the detention order on the grounds raised and considered by the Division Bench and the Full Bench had clearly failed. Obviously, therefore, the challenge against the detention order dated 19.12.1974 on the footing that the grounds for it were not valid could not have been raised again by the appellant in any subsequent petition. This is why perhaps in Special Civil Application No.2051 of 1979 the appellant did not challenge the detention order raising only the wider constitutional issues again challenging the Constitution 38th, 40th and 42nd Amendments and the validity of the SAFEMA. This petition was dismissed by the Division Bench on 09.08.1994 in view of the decision of the Supreme Court in Attorney General (supra). The statements made on oath in paragraph 5 of Special Civil Application No.3477 of 1996 that "..... the order of detention dated 19.12.1974 was challenged by the petitioner by filing a petition in the Honourable High Court on various grounds being Special Civil Application No.2051 of 1979" and in paragraph 6 "that the petition filed by the petitioner against the order of detention on 19.12.1974 could not be pursued by him and could not be decided on merits by this Honourable High Court on account of the powers of the High Court being taken away by the Constitutional Amendment made during the emergency in 1977 or thereabout, the petitioner again filed a petition being Special Civil Application No.2051 of 1979

as stated hereinbefore in which he substantially challenged both the order of his detention dated 19.12.1974 and also various provisions of the SAFEMA, are classic examples of misleading the court, because in Special Civil Application No.2051 of 1979, no such prayer against the validity of the detention order was made and in fact, in para 2 of the petition it was stated that "the said order of detention will be separately challenged by the petitioner", which was also a misleading statement as the said order of detention was earlier challenged in Special Criminal Application No.51 of 1975 and the challenge was negatived, as per the Division Bench and the Full Bench decisions on the narrower grounds which were considered and concluded by the court.

22. The detenu could not have reagitated the questions concluded in Special Criminal Application No.51 of 1975 by the decisions of the Division Bench and the Full Bench under which his challenge against the detention order on narrower grounds had failed since it was held that the detention order could be sustained on ground no. 2 in view of the retroactive effect of Section 5-A of the Act. The learned Single Judge was, therefore, right in rejecting the petitions on the ground that they were barred by the principle of res judicata. Though the said detention order was challenged in the present petitions, these petitions were not for a writ of habeas corpus since the detenu was released long ago on 23rd March, 1977 and his detention was sought to be challenged again because of the impending SAFEMA proceedings.

22.1 We may in this context recall the decision of the Constitution Bench in Devilal Modi vs. Sales Tax Officer, Ratlam and Others reported in AIR 1965 SC 1150 in which it was held that:

> "..... it would not be right to ignore the principles of res judicata altogether in dealing with writ petitions filed by citizens alleging the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such cases, and the basic doctrine that judgment pronounced by this Court are binding and must be regarded as final between the parties in respect of matters covered by them must receive due consideration.
>
> If a plea could have been taken by a party in a proceeding between him and his

opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy.

Consideration of public policy and the principle of the finality of judgments are important constituents of the rule of law and they cannot be allowed to be violated just because a citizen contends that his fundamental rights have been contravened by an impugned order and wants liberty to agitate the question about its validity by filing one writ petition after another.

If constructive res judicata is not applied to such proceedings a party can file as many writ petitions as he likes and take one or two points every time. That clearly is opposed to considerations of public policy on which res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgment would be materially affected."

22.2 In Forward Construction Co. and Others vs. Prabhat Mandal (Regd.), Andheri and Others reported in (1986) 1 SCC 100, it was held that the judgement of the High Court in earlier writ petition would operate as res judicata even where one of the grounds stated in the subsequent writ petition before the High Court was absent in the earlier petition. Therefore, there is no substance in the contention raised for the appellants that the detenu could have raised couple of other permissible grounds if the petition was not dismissed on 04.02.1977. No one had prevented the detenu from raising any permissible ground. No such attempt was made, and this conjectural submission was made only as an afterthought.

23. For the reasons given above, we hold that all these petitions have been rightly rejected. The appellants have clearly withheld the most material orders

of the Division Bench and the Full Bench, made in his earlier proceedings (Special Criminal Application No.51 of 1975), which had a direct bearing on the question of the validity of the detention order which was already examined on the grounds which were considered by the Division Bench and the Full Bench. But for the long time that has elapsed, we would have initiated suitable proceedings against the appellants for suppression of material facts and trying to overreach the court. We only deprecate their conduct and leave it at that. These petitions and the appeals are a frivolous and misleading attempt repeated to raise the concluded aspects of the matter and therefore, the appellants must pay costs which are quantified at Rs.10,000/- in each appeal, to the respondent Union of India and the State of Gujarat in one set. All the three appeals are therefore, dismissed with costs quantified at Rs.10,000/- to be paid by the appellant in each appeal to the respondent Union of India and the State of Gujarat in one set each. Rest of the parties will bear their own costs.

(R.K. Abichandani, J.)

(M.C. Patel, J.)

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